MINOR OPERATING MOTOR VEHICLE HELD TO SAME STANDARD OF CARE AS ADULT WHEN CHARGED WITH PRIMARY COMMON-LAW NEGLIGENCE

Carano v. Cardina
115 Ohio App. 30, 184 N.E.2d 430 (1961)

Plaintiff brought an action in the court of common pleas seeking recovery of damages for personal injuries suffered as the result of being struck by an automobile driven by defendant who was a minor, seventeen years of age. A general verdict for defendant was returned upon which judgment was entered. Plaintiff appealed the verdict on questions of law, presenting two assignments of error, one of which was the instruction in the general charge pertaining to the standard of care required of the minor defendant.[1] The court had charged the jury that the minor defendant was not to be held to the same standard of care as an adult, declaring that a minor seventeen years of age was to be held to a degree of care that ordinary, careful automobile drivers of like age and of similar experience, education and ability (mental and physical) are accustomed to use in the same or similar circumstances.[2] Appellant contended that a seventeen-year-old minor should be held to the same degree of care as an adult when the minor is operating a motor vehicle. The court of appeals reversed, holding that in the operation of motor vehicles upon the highways of Ohio, a minor is to be held to the same standard of care as an adult.

The standard of care required of an adult[3] has long been that "which

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[1] The other assignment of error concerned negligence of the plaintiff and is not relevant to the subject of this note.

[2] Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430 (1961). The charge regarding standard of care was:

> . . . [T]hat degree of care that ordinary, careful and cautious automobile drivers of the age of 17 years who are possessed with like experience, education, ability, mental and physical capabilities as the defendant, are accustomed to use under like or similar circumstances. In other words, a young man of 17 years of age is not chargeable with the same standard of care as is an adult. To determine his standard of care you will consider the defendant's age, his education, his experience with automobiles, his training and knowledge concerning traffic rules, and his mental and physical capabilities, all as of the time of the collision. And then after determining this standard or degree of care that such young men would or should exercise under the same or similar circumstances, you will determine whether by the degree of proof charged the defendant met that standard or fell below it. If he met the standard and exercised that degree of care reasonably to be expected of him under the existing circumstances, then you will say he is not guilty of negligence in this respect. But, if you find by the degree of proof charged that he fell below the standard of care, then you will say he was negligent.

[3] Prosser, Torts § 31 (2d ed. 1955): "The standard required of an individual is that of the supposed conduct, under similar circumstances, of a hypothetical person, the reasonable man of ordinary prudence who represents a community ideal of reasonable behavior."

requires in all cases a regard to caution such as a man of ordinary prudence would observe."[4] Ohio has accepted this standard of care as a requirement of its adults[5]—that is, an objective standard.

Minors[6] have not been required to meet this objective standard.[7] The leading case of *Charbonneau v. MacRury*[8] held that the law must be indulgent in deciding the quality of a minor's conduct and that the adult test of the reasonable man cannot be applied without regard for the minor's age and experience. The standard usually applied to minors is essentially a subjective standard of care.

In the majority of situations, Ohio has followed the *Charbonneau v. MacRury* view as to the standard of care required of minors.[9] Ohio requires a child to exercise the degree of care which would be exercised by other children of the same age, intelligence and experience acting under the same or similar circumstances.[10] Heretofore, no distinction has been made in the standard required of a minor when he is engaged in adult rather than children's activities.

The instant case announces a new standard of care for minor operators of motor vehicles who are charged with actionable negligence: it is the same standard of ordinary care as is required of a reasonably prudent adult.

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[4] Vaughan v. Menlove, 3 Bing (N.C.) 467, 132 Eng. Rep. 490 (C.P. 1837).

[5] Dennison Coal and Supply Co. v. Bartelheim, 122 Ohio St. 374, 378, 171 N.E. 835, 836 (1930): "Now the duty . . . was to exercise the ordinary and reasonable care that an ordinary, reasonable and prudent man placed under the same or similar circumstances would have exercised. . . ."

[6] 27 Am. Jur. *Infants* § 2 (1940) defines *infant* as "any person who has not reached the age, usually twenty-one years, at which the law recognizes a general contracting ability." The meaning is usually expressed by the word *minor*.

[7] Restatement, Torts § 283 (1934): "Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."

Comment *e*: *Children*. "The standard of conduct required of children is that which it is reasonable to expect of children of like age, intelligence and experience."

But see Restatement (Second), Torts § 283A, comment *c* (Tent. Draft No. 4, 1959): *Child engaging in adult activity*. "An exception to the rule stated in this section may arise when the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required. . . ."

[8] 84 N.H. 501, 153 Atl. 457 (1931).

[9] Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N.E. 466 (1889). Ordinary care for infants "is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances." *Accord,* Vega v. Evans, 128 Ohio St. 535, 191 N.E. 757 (1934); Cleveland, C.C. & St. L. Ry. Co. v. Grambo, 103 Ohio St. 471, 134 N.E. 648 (1921).

[10] 28 Ohio Jur. 2d *Infants* § 39 (1958):

> . . . [I]n the case of negligence, there is authority to the effect that a minor is not to be held to the standard of care of an adult without regard to his nonage and want of experience. It has been stated that a child is required to exercise only that degree of care which the great mass of children of the same age exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child.

The *MacRury* case also held that the same subjective standard of care applied to minors whether they were charged with contributory or primary negligence. The court said that to require a minor to exercise a higher degree of care for the protection of others than he is required to exercise to protect himself would be an unreasonable distinction.[11] Moreover, the standard was applied without regard to the type of activity in which the child was engaged.

However, where motor vehicles are involved, the Ohio court has followed the lead of the Minnesota Supreme Court which held in *Dellwo v. Pearson*[12] that in the operation of an automobile, airplane or powerboat, a minor is to be held to the same standard of care as an adult. The Minnesota court held that when children are engaged in children's activities it can be anticipated that they will act as children, and anyone observing this activity has fair warning of what manner of behavior to expect. A person does not have this same warning when minors engage in the adult activity of operating a motor vehicle. Usually it cannot be determined whether the operator is a minor or an adult. The court reasoned that even when warned of the operator's minority, one "usually cannot protect himself against youthful imprudence."[13] The need for the requirement of an adult standard of care for all who engage in an adult activity is apparent.[14]

The departure from the subjective standard of care for minors operating motor vehicles charged with primary negligence has become necessary. The death toll on our highways due to carelessly operated vehicles is tragically high.[15] Much of this carnage is caused by minors.[16] The loss resulting from

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[11] Charbonneau v. MacRury, *supra* note 8, at 508, 153 Atl. at 461:

> If the law requires a minor for his own protection "to exercise the degree of care and caution of which he is capable," or which he "would naturally be expected to use," to use "the reason he did possess," to conduct himself "free from fault," to do what one of his age, experience, opportunity and capacity would have done, it is plain that to exact of him a higher standard of care for the protection of others would be to require him to exceed his capabilities. . . . The law makes no such unreasonable demand.

[12] 259 Minn. 452, 107 N.W.2d 859 (1961).

[13] *Id.* at 458, 107 N.W.2d at 863.

[14] It has been previously held in Ohio, in Karr v. MacNeil, 92 Ohio App. 458, 110 N.E.2d 714 (1952), that a nineteen-year-old minor had the same obligation as an adult in observing the statutory requirements in operating a motor vehicle on the public highways, "and a violation thereof by such minor constitutes negligence as a matter of law; and, if such negligence proximately causes injury to another, the minor may properly be held to respond in damages for the tort." The Ohio court felt that the instant holding would bring the standard of care for minors charged with primary common-law negligence while operating a motor vehicle in line with the rule announced in Karr v. McNeil.

[15] In 1961, actions of drivers resulted in 30,800 deaths; in 1960, the toll stood at 30,400 deaths. "Cowboys and Engines," The Travelers 1962 Book of Street and Highway Accident Data, published by The Travelers Insurance Company, p. 4.

[16] In 1961, 27.3% of drivers involved in fatal accidents were 24 years of age or under; 4.7% were under 18 years of age. About 15% of all licensed drivers are 24 years of age or under. This age group is involved in approximately "twice as many fatal accidents as its numbers warrant." *Id.* at 8.

the careless operation of a motor vehicle is as great whether the negligent operator is a minor or an adult. In the motor vehicle cases, there has been a tendency to apply an objective standard of care to minor operators.[17] The application of the objective standard in primary negligence charges against minor operators enables the loss caused thereby to be compensated for and distributed through the use of insurance, whereas the subjective test often results in uncompensated losses.

The subjective standard has been primarily voiced in cases dealing with minors charged with contributory negligence.[18] The late Harry Shulman, Dean of the Yale Law School, made the following cogent argument in support of a dual standard of care applicable for children:

> The standard of conduct to which an infant is to be held when his own liability is in question may properly be quite different from that to which he is to be held when he seeks to recover from an admittedly negligent defendant. It is apparent that different considerations may be involved in these several types of cases. There is a strong policy in favor of protecting children from losses attributable to their immaturity. It would be quite plausible, therefore, for a court to be more lenient toward children whose injuries are attributable, not only to their immaturity, but also to conceded tortious conduct on the part of the defendant, than toward children who are the sole responsible cause of injury to others.[19]

The subjective test protects children from uncompensated loss caused in part by their immaturity and in part by the tortious conduct of another. A different standard should be applied when the child's actionable negligence has caused his liability to be put in issue. Here the loss due to the child's immaturity is cast upon another person. The policy argument for the use of the subjective standard is weak in this instance.

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[17] Shulman, "The Standard of Care Required of Children," 37 Yale L.J. 618 (1928): There are very few cases in which the problem is raised in an issue of direct negligence for which the infant is sought to be held liable. Most of the cases discussing the problem are concerned with the child's alleged contributory negligence, or assumption of risk or some other disabling contributory fault. In many cases where the child's conduct is considered, the only issue relates to the negligence of the defendant, and the infant's conduct is important only in determining whether or not the defendant discharged his duty of reasonable care under the circumstances.

[18] Harper & James, The Law of Torts § 16.8 (1956):
The few appellate courts that have faced the problem have also been divided, though there is reason to believe that trial courts are generally applying an objective adult standard in motor vehicle cases.... [B]y and large children themselves cannot and do not pay for the injuries they cause. . . . [T]hey constitute one of the most dangerous classes in society so far as causing motor accidents goes. It was our conclusion that courts should and probably will (for the most part) driving a car) to the standard of the reasonably prudent adult.
hold the child defendant who is engaging in dangerous adult activities (such as

[19] Shulman, *supra* note 16, at 619.

The court in the instant case has changed the Ohio rule in regard to the standard of care required of minor operators of motor vehicles upon the public highways who are charged with primary common-law negligence. It is submitted that the application of the *objective* standard to minor operators of motor vehicles charged with *primary* common-law negligence is proper. However, it is felt that this standard should be *limited* to actionable primary negligence. The retention of the *subjective* test in cases of *contributory* negligence will serve to protect the minor from losses caused *in part* by his immaturity, while the use of the objective standard for charges of actionable primary negligence against minor motor vehicle operators will serve to protect injured persons from losses caused *solely* by the minor's negligence.

The proposed limitation will result in a dual standard of care for minors. There are no real difficulties inherent in such a dual standard. Both standards can be applied with results which will be of greater benefit to society.